IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-686

JAMES N. FLEMING

Petitioner

vs.

CITIZENS FOR ALBEMARLE, INC.
and
ALBEMARLE COUNTY TAXPAYERS, INC.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner James N. Fleming respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on June 12, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals reported at 577 F2 236 and the order of that court filed July 24, 1978 denying petitioners request for a rehearing and for a stay of the mandate appears in the Appendix. The opinion rendered by the District Court for the Western District of Virginia on August 12, 1976 also has been made a part of the appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on June 12, 1978. A timely petition for a rehearing en banc was denied on July 24, 1978 and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. ∫1254(1).

QUESTIONS PRESENTED

(1) Was the evidence offered by the applicant intervenors in the District Court proceeding on their application to intervene sufficient to support the appeals court findings that the applicant intervenors had demonstrated "such an interest relating to the property or transaction" in suit that "the dispostions of the actions" could "impair or impede" their ability to protect their concerns?"

(2) Did the District Court abuse its discretion, as the Court of Appeals found, in refusing to allow the intervention as a matter of right under Rule 24(a)?

STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 24(a) and (c)

Rule 24. INTERVENTION

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposion of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an

action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. ∫2403.

STATEMENT OF THE CASE

The background of this petition is somewhat unusual. In March 1975, the petitioner James N. Fleming, along with a limited partnership owned by several business associates of Fleming and a closely held corporation in which Fleming owned a substantial portion of the stock, brought suit Albemarle County, Virginia as well as the members of its Board of Supervisors in their official and individual capacities. The claim was filed in the United States District Court for the Western District of Virginia. Plaintiff's asked for declaratory relief, injunctive relief and for money damages. In short, the claim of the plaintiffs was that the county through its governing body had unjustly refused to rezone approximately one hundred and twenty-five (125) acres valued at more than one-half million dollars of county land owned by them to allow construction of a subdivision because of illegal and unconstitutional considerations of race. Fleming is Black, and he had publicly announced upon filing his initial rezoning application with county officials that he intended to develop a racially integrated low or moderate income oriented subdivision on the lands owned by himself, the partnership and his corpora-

tion.

The Plaintiffs invoked the jurisdiction of the "reconstruction era" civil rights statutes, i.e., 42 U.S.C. 1981, 42 U.S.C. 1983, 42 U.S.C. 1985, etc. The defendant's filed motions to dismiss, Pleas of Immunity, etc.

The case was much publicized in one local press and it was on the courts docket for more than fourteen months before it was tried. Unsuccessful attempts were made to settle the matter of which the court was aware. The matter came to trial on April 19, 1976 before the Chief District Judge sitting with an advisory jury. The defendants were represented by the county attorney and his deputy. All defensive motions objections and special pleas were taken under advisement prior to trial. The defendants filed an answer indicating that the developers' application had been rejected because of legitimate planning considerations. The plaintiff's case took nearly four days to present. The defendants began their presentation of evidence but decided at a recess after conferring in chambers with the judge and counsel for the plaintiffs to settle the dispute by agreeing to a rezoning of the property. First, it was agreed that an order he entered dismissing the claim as to several past members of the Board of Supervisors all of whom had been defeated in the November, 1975 ele elections and who from the evidence before the court appeared to have actively encouraged the rezoning of petitioner's land. Then, a final dismissal order was fashioned and endorsed by counsel for all parties remaining and entered by the court on Monday, April 26, 1976, bringing the two and one-half year old, well publicized controversy between the plaintiffs and the county to an end. Appendix page 11a. Plaintiffs had originally sought a a rezoning which would have allowed them to build at a density of up to six and one-half (6½) units per acre. Under the terms of the compromise, the property was rezoned for approximately two and one-half (2½) units per acre. No damages, attorney fees or costs were allowed as a part of the settlement. On May 6, 1976, ten days after entry of the dismissal order and after the board of supervisors had met to ratify the settlement, and to vote to rezone the property, two predominately white citizen groups filed motions in the District Court to intervene and for a new trial. The applicants relied upon F.R.C.P. 24(a).

The petitioner filed a motion to strike the applications on procedural grounds. Neither the county nor any of the individual defendants made appearances in the intervention proceedings. A hearing was set for July 6, 1976. Petitioner argued in the trial

court that the intervenors had not fully complied with the procedural requirements of Rule 24 i.e., that no Answer as is required by subsection (c) of Rule 24 had been filed with the motion; that the attempt was not timely and that the proposed intervenors had no legally protectable interest in the controversy which would support intervention apart from that represented by the county and the members of the Board of Supervisors. A full evidentiary hearing was had. Six persons testified for the applicants, two of county board members who had been parties to the April 26, 1976 settlement, the County Attorney, his deputy and the presidents of the two citizens' groups attempting to intervene. In their testimony both supervisors suggested that certain comments made by the trial judge in his discussions in chambers with the parties and their lawyers had unduly influenced them to enter into the settlement agreement which they did not feel was in the best interest of the County. The two lawyers testified that they had communicated to their clients comments made to them by the trial judge which indicated that he intended to rule for the plaintiffs and that if he did he also intended to award money judgments against the members of the governing body in their private capacities, if that was appropriate, and the lawyers testified that they had urged the supervisors to settle with the plaintiffs given the remarks of the judge.

The trial judge entered his own objection to the testimony as to the chambers conference indicating that such testimony was improper and would not be considered by him in deciding the motions. The court allowed the testimony to be proffered for the record. The entire testimony of the presidents of the civic groups, Alexander P. Janssen and J. Kenneth Haviland, is set out in the Appendix. That testimony establishes that Albemarle County is a county of more than forty thousand residents; that the two citizens groups had a membership of approximately one thousand person; that the two groups had kept themselves informed as to the progress of the controversy involving Fleming, his fellow developers and the county and that the membership of the two groups believed that a decision to allow Fleming to develop the property, which is situated in the area of a county reservoir, would have a detrimental impact upon the ecology of that area and upon the public water supply. When questioned as to what their specific interests were the witnesses tended to be vague: see for example Appendix page 25a. When questions as to their

knowledge of the nature of Fleming's original claim i.e., a claim based upon race discimination, the witnesses were again vague, although at the April 19, 1976 trial it had been clearly shown that white persons had been given permits to develop in the subject area residential units for greater population density than the petitioner was seeking.

By opinion and order dated August 11, 1976 the District Court found that the motions to intervene were not timely filed, that the intervenors' interest had been adequately protected; that the settlement itself was fair and, therefore, that intervention was not proper and should not be granted. See the opinion of the District Court dated August 11, 1976, Appendix page 8a. The applicants appealed. The matter was presented in oral argument to a three judge panel of the Fourth Circuit Court of Appeals on March 6, 1978. Only petitioner and the respondants appeared in the Court of Appeals. In an opinion dated June 12, 1978, the decision of the trial court was vacated, the matter ordered remanded to the trial court with the directive that the intervention be allowed, that certain evidence not permitted and not considered by the trial court be taken and that a hering be had as to whether the settlement of April 26, 1976 should be set aside. The opinion also directed that an "answer" be required from the county with respect to the validity of the settlement. The opinion went on to direct that another District Judge be assigned to hear the case upon remand in that the trial judge might be called as a witness upon remand. See Opinion of the Court of Appeals for the Fourth Circuit dated June 12, 1978, page 3a. Appendix. The petition for rehearing was denied on July 24, 1978.

REASON FOR GRANTING THE WRIT

The decision of the Appeals Court rests upon a strained construction of the requirements of Rule 24 of the Federal Rules of Civil Procedure allowing intervention as a matter of right and establishes a precedent which will have an adverse consequence upon the orderly disposition of civil litigation.

The June 12, 1978 decision of the appeals court in this case clearly breaks new ground with regard to the rights of proposed intervenors under Rule 24(a) of the Federal Rules of Civil Procedure and in the opinion of the petitioner, established an exceedingly dangerous precedent. A reading of the leading cases

decided since the 1966 revision of Rule 24(a) shows clearly that this Court favors intervention in all such cases when intervention works in the interest of judicial economy and the right of parties to have their respective days in court. See **United States Airlines, Inc. vs. McDonald**, 432 U.S. 345, 97 S. Ct. 2464 53 L Ed 2d 423 (1977). Applicant intervenors, nevertheless, continue to have imposed upon them a burden to timely apply and to clearly establish either that they are permitted intervention by a statute of the United States or that they claim an interest relating to the property or transactions which is the subject of the action and are so situated that the disposition of the action may as a practical matter impair or impede the inability to protect their interest, unless it is found that they are adequately represented by existing parties. It is within the sound discretion of the trial judge to determine whether in each case the applicant meets the test.

The trial court in this case gave the applicant intervenors a full hearing, allowing them to call witnesses thought necessary to support their applications. Only after that hearing did the court determine that the applications were not timely made, that the voluntary settlement between the county, the members of the governing body and the plaintiffs was fair and reflected a compromise on the part of all parties, and that the interests represented by the two citizens groups had been fully and adequately represented by the original party defendants, and that intervention should not be allowed.

Upon appeal, a panel of the Fourth Circuit Court of Appeals found that the trial judge abused his discretion in not allowing intervention as a matter of right under Rule 24(a).

Petitioner submits that the panels' findings can not be based upon the record in this case. A review of that record shows that the intervenors, in the evidence before the trial court, established nothing to show that they should have been permitted in the case after its amicable settlement. Evidence as to what their legally protectable interests are, a necessary element giving rise to a right to intervene, is simply not shown. The court is referred to the testimony of Professor Haviland, President of the Citizens for Albemarle, Inc., and that of Alexander P. Janssen, President of the Albemarle County Taxpayers set out fully in the appendix. Petitioner submits that the court of appeals may have been sidetracked somewhat by the arguments in the District Court, participated in by the Court, as to what was proper evidence. The trial judge did, indeed, object to and exclude from his considera-

tion certain testimony by two county board members who were defendants and parties to the settlement and their attorneys as to the impact upon them of certain remarks urging settlement made by the trial Judge in chambers. The excluded testimony was proffered, however, and is available for this court's examination as a part of the record.

Surely, intervenors should have to establish more than the mere existence of displeasure at a settlement or at the way in which litigation was managed: see **Dobson, et als vs. Salvitti, et als**, United States District E.D. Penna August, 1977 F.R.D. 674, a case very similar in facts to the instant case, whereupon the district judge refused to allow intervention by certain Philadelphia area property owners who objected to a proposed settlement between the private plaintiffs in that case, described as persons displaced from their homes through urban renewal, and various federal and city agencies, charged with assisting them in their relocation efforts because the settlement included an agreement to locate low cost housing in or near neighborhoods lived in by the applicant intervenors.

The court there found that the applicants had no direct substantial legally protectable interest . . . "citing the requirements of **Hobson vs. Hansen** 44 F.R.D. 18 (D.D.C. 1968). The court also found the applicant intervenors had chosen to "ignore" this litigation until approximately two and one half years after its commencement, long after various alternative settlement possibilities had been fully explored . . .". The District Court distinguished the facts, supporting the ultimately successful intervenor in **United States Airlines vs. McDonald** 432 U.S. 385, 97 S. Ct. 2464, 53 LED 2d 423 (1977) who attempted to intervene after settlement to appeal an earlier denial by the trial court of class certification after it was evident that the plaintiffs did not intend to appeal. **United States Airlines** supra favors intervention but the case really is a narrow holding limited to rather esoteric questions concerning the tolling of the statute of limitations, the responsibility of members of a putative class upon denial of certification as relates to intervention, generally under Rule 24.

Interestingly, the conclusion of the majority in **United States Airlines** is soundly criticized in a dissent authored by Justice Powell joined by the Chief Justice and Mr. Justice White. The dissenter's cautioned that "today's decision will deter settlements because of the additional uncertainity as to whether the agreement will be nullified by the actions of persons who enter

the litigation only after final judgment"; **United States Airlines vs. McDonald, supra, 53 L Ed 2nd P 437**. Certainly the problem is real. The circuit Court's decision in this case opens the doors much wider to intervenors than the Supreme Court has yet seet fit to do. It finds an "abuse of discretion" on the part of the trial judge in his conclusion that the applications were not timely filed although it is clear from his opinion that he resorted to the totality of circumstances tests prescribed by their Court in **N.A.A.C.P. vs. New York** 413 U.S. 345 37 L Ed 2d 648 (1973). Similarly, an absolute right of the applicants to intervene was found by the panel on virtually no relevant record.

CONCLUSION

For the reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 76-2308

JAMES N. FLEMING,
and
FLEMENCO ENTERPRISES, INC.,
a Virginia Corporation,
and
Four Seasons West
A Limited Partnership, Appellees,
v.
CITIZENS FOR ALBEMARLE, INC., and
ALBEMARLE COUNTY TAXPAYERS, INC., a
Virginia Corporation, applicants
as intervention defendants, Appellants.

Appeal from the United States District Court for the Western District of Virginia, at Charlottesville. James C. Turk, Chief Judge.

ORDER DENYING REHEARING AND REFUSING STAY OF MANDATE

Upon consideration of the petition of the plaintif-appellees for a rehearing with the suggestion for a rehearing in banc, it appearing that no request for a poll of the entire court has been made, as provided by Rule 35(b), of the Rules of Appellate Procedure, now, with the concurrence and approval of Judges Butzner and Widener, the other members of the hearing panel, it is

ORDERED that the said petition for rehearing be, and it is hereby, denied, and it is further

ORDERED that the motion for a stay of the mandate be, and it is hereby, denied.

For the Court
S/Circuit Judge Bryant

A True Copy, Teste:
William K. Slate, II, Clerk
By S/Emily Rueger
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-2308

JAMES N. FLEMING,
and
FLEMENCO ENTERPRISES, INC.,
a Virginia Corporation,
and
Four Seasons West
A Limited Partnership, Appellees,
v.
CITIZENS FOR ALBEMARLE, INC., and
ALBEMARLE COUNTY TAXPAYERS, INC., a
Virginia Corporation, applicants
as intervention defendants, Appellants.

Appeal from the United States District Court for the Western District of Virginia, at Charlottesville. James C. Turk, Chief Judge.

Argued March 9, 1978 Decided June 12, 1978

Before BRYAN, Senior Circuit Judge, BUTZNER and WIDENER, Circuit Judges.

James B. Murray, Jr. (Richmond and Fishburne on brief) for Appellants; Gerald G. Paindexter (Poindexter on brief) for appellees.

BRYAN, Senior Circuit Judge:

The initial prayer in this appeal is for leave to the Citizens for Albemarle, Inc. and Albemarle County Taxpayers, Inc. to intervene in an action for declaratory and injunctuve relief, as well as damages, against Albemarle County, Virginia and its Board of Supervisors, individually and officially, for refusal allegedly upon racial bias of the plaintiffs' request for rezoning of land for development into a planned community. 42 USC 1983. Next, upon allowance of intervention appellants would seek vacation of and a new trial upon the April 26, 1976 District Court decision ordering the rezoning because of a purported *pendente lite* agreement of the Supervisors, now impeached by the appellants as procured under duress. Both intervention and the new trial were denied on August 11, 1976 and the movants appeal.

I

We think, to begin with, the intervention was demandable of right, its refusal an abuse of discretion.[1]

---

1. Rule 24. Intervention
   (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

1. Appellants moved with dispatch. The rezoning came about through events hardly foreseeable before the decree of April 26, 1976. Appellants lodged their motion with the Clerk of Court on May 5, with copies then mailed to the trial judge and to all of counsel, but it could not be "filed" until the next day, the Clerk having closed his office early on the fifth. FRCiv. P 5

2. Again, the appellants claimed and, as will momentarily appear, asserted substantial grounds for claiming "an interest relating to the . . . subject of the action" and were "so situated that the disposition of the action (could) as a practical matter impair or impede (their) ability to protect that interest unless (their interest was) adequately represented by existing parties". FRCiv. P 24 (a) (2).

3. The motion for intervention appropriately laid cut its grounds. It was attended by a pleading consisting of a motion, to set aside, in effect, the order of April 26, 1976 and to grant a new trial, reciting therein appellants' defenses to the rulings of the District Court in the order. FRCiv. P 24 (c) and 59.

In fine, appellants met with all the procedural prerequisites exacted of an intervenor. Above all, their effort at intervention in the circumstances was not precluded, as has been suggested, because their motion was not made until after a final decree had been entered. *Vide:* Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 US 129 (1967).

II

The facts demonstrate incontrovertibly that appellants possessed, as just observed in referring to Rule 24 (a) (2), such "an interest relating to the property or transaction" in suit that "the disposition of the action" could "impair or impede" their ability to protect their concern. Admittedly, the two corporations were composed of upwards of 1000 residents or property owners in the County who, not without reason, feared that the "planned community" would endanger the purity and potableness of the water in the Albemarle County Reservoir. This question was the subject of conferences between the plaintiffs, the owner of the site of the proposed community, and his associate, on the one hand, and the Supervisors including the County Attorney, on the other. The first suggested solution of their differences was discarded, a second pondered.

Before formal consummation of an agreement upon the second proposition, several of the Supervisors had left the Board because of the expiration of their terms of office; new members succeeded them. With no settlement ensuing, the action came on for trial before the District Judge and an advisory jury on Monday, April 19, 1976. Plaintiffs' proof outlined the two unadopted rezoning plans but it indicated that the second

one had seemingly been agreeable to, though never accepted by, the first Board of Supervisors. Defendants' case began Thursday, April 22 and continued for four and a half hours, after which the Court recessed until Monday, April 26. Before dispersal, however, the judge asked counsel to meet with him.

At that time the judge pressed the Supervisors to accept the proposed settlement, stating that he had been advised that the former Board had consented to settle the case in September 1975 and that he should "hold them to this commitment". Further, the judge stated, there were indicia of "hanky-panky" afoot, possibly by the second Board. Finally, he warned that should damages be awarded against the Supervisors, he would do all he could to see that the damages were paid out of their own pockets, reminding them that he, not the jury, would actually fix the amount. These remarks were heard by some of the Supervisors and repeated to others by the County Attorney.

On conclusion of the meeting of the judge with counsel, the County Attorney asked him for an opportunity to convene the Board to think about a settlement. At this gathering the judge's comments upon the possible personal monetary answerability of the Supervisors were repeated. Thereupon the Attorney advised them to make the settlement, rather than to hazard their "entire personal fortune", adding that this overbalanced any ~~risk~~ risk to the public. He confessed that this course was not advised in the County's best interest, but was to save the Supervisors from pecuniary loss.

After this conference on April 22, the case was adjourned to Monday, April 26. When the Court reconvened that day the order affirming the settlement and granting the rezoning was signed. Thereafter, on May 5, as heretofore related, appellants tendered their motion to intervene. It was heard July 6.

At that session appellants offered the testimony of all those who had heard admonitions given by the judge on April 22 to the Supervisors to settle the case. This evidence was objected to by the judge *sua sponte* and held inadmissable by him. However, he let it be put off record as a proffer of proof but not to be considered. On August 11, 1976 by opinion and order the motion for intervention and a new trial were denied and are ~~now~~ now in this appeal.

Our decision is to reverse. The unquestioned proof manifestly establishes that the appellants had "an interest relating to the . . . subject of the action", and that they were "so situated

the disposition of the action (could) as a practical matter impair or impede (their) ability to protect that interest, unless (appellants' interest was) adequately represented by existing parties". FRCiv. P 24 (a) (2). Obviously, appellants' interest was not represented at all.

The order of August 11, 1976 will be vacated, and this action is remanded to the District Court with directions to allow the intervention; to admit in evidence the testimony proffered by the appellants of the advice urged by the trial judge on April 22; to grant a new hearing on whether the settlement should be set aside; and to require an answer from the county with respect to the validity of the settlement. Because the trial judge then presiding may be called to testify in the action after the remand, another judge should be assigned for the hearing of this case.

Vacated and Remanded.

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

JAMES B. FLEMING, et al,
plaintiff

vs.

ALBEMARLE COUNTY, et al,
Defendants

Civil Action Number 75-11 (C)
MEMORANDUM OPINION
and
ORDER
By: James C. Turk
Chief, U.S. District Judge

This case is before the court for decision on a motion to intervene pursuant to Fed. R. Civ. P. 24(a) and a motion for a new trial pursuant to Fed. R. Civ. P. 59 filed by the Albemarle County Taxpayers, a non-profit Virginia corporation and the Citizens for Albemarle, an unincorporated Virginia association (hereinafter "intervenors").

A brief review of the history of this case is necessary. This suit was filed on March 17, 1975 by James Fleming and two of his business enterprises against Albemarle County, Virginia and the members of the Albremarle County Board of Supervisors. The members of the Board of Supervisors were sued individually and in their official capacities and the plaintiffs sought damages and injunctive and declaratory relief. The basis for plaintiffs' suit was that the Board of Supervisors had refused their request to rezone certain land which they proposed to develop into a planned community for middle income persons and that such refusal was based on racial considerations. Plaintiff Fleming is a black man.

As this case progressed the parties discussed settlement and at a pretrial conference on September 19, 1975 it appeared that a settlement would be reached. However, agreement between the parties was not achieved and the case came to trial before a jury on April 19, 1976. Meanwhile four members of the Board of Supervisors had been defeated for re-election and the four new members of the Board were added as party defendants. The court took under advisement defendants' various motions

pending the presentation of evidence. Evidence was presented from April 19 until April 22, 1976 at which time court was recessed until April 26. When the trial resumed on April 26, 1976 the parties met with the court and agreed to a settlement. The court accepted the settlement and dismissed the case subject to the conditions agteed upon by the parties and the court. Ten days later, on May 6, 1976 the present motion to intervene and motion for a new trial were received by the court.

In support of their motion to intervene, the intervenors assert that because of the threat of personal liability to the individual defendants they could not and did not adequately represent the interest of Albemarle County and its Board of Supervisors. Intervenors claim to represent the citizens of Albemarle County in their efforts to protect their water supply which they assert is jeopardized by the settlement reached in this case.

Pursuant to either *Fed. R. Civ. P.* 24(a) (intervention of right) or 24(b) (permissive intervention) the application to intervene must be "timely". The rules do not define what is "timely" and accordingly a determination of timeliness is a matter left to the court's discretion. *See* 7A Wright & Miller, *Federal Practice and Procedure* 572-584 (1972). "Timeliness is to be determined from all the circumstances". *NAACP v. New York*, 413 U.S. 345, 366 (1973).

In this case the court is of the opinion that the circumstances do not justify intervention. The motion to intervene in this case was filed almost fourteen months after the suit had been filed and after settlement had been reached. This case generated considerable publicity in the Albemarle County area from its inception, and the issue of land development which might adversely affect the South Rivanna River Reservior has been a controversial policical issue in Albemarle County for a considerable period of time.

Intervenors contend that prior to the settlement agreement in this case, they reasonably expected that the County would protect their interests, and it was only after the defendants agreed to settlement that they realized that intervention was necessary to protect their interests. Intervenors claim that the defendants agreed to settle the case in order to protect their personal pecuniary interests at the expense of the public's interest in the drinking water supply. However, this suit sought damages from the members of the Board of Supervisors in their individual capacities from the outset, and intervenors must be

charged with knowledge of the alleged conflict-of-interest from the beginning. But more fundamentally, this court cannot accept the intervenors' contentions that the individual defendants completely ignored the interests of their constitutents in reaching this settlement and that the settlement achieved in this case threatens the public's water supply. The settlement agreement reached in this case embodies substantial compromises by both sides. From the beginning plaintiffs had sought to have their property zoned so as to allow at a density of 6.7 units per acre as had been allowed previously by the county on adjacent land; yet the final settlement order in this case allows development of the property on the basis of a density of only 2.5 dwelling units per acre. In addition plaintiffs' planned development is explicity "subject to the existing laws and ordinances of Albermarle County Planning Commission as set out in the minutes of the Commission under date of January 13, 1976, subject to modification by the Board of Supervisors as it shall deem appropriate."

The court is of the opinion that the settlement reached in this case is eminently fair to both sides and the citizens of Albemarle County. The court is further of the opinion that counsel in this case are to be commended for their efforts in reaching this settlement. From the court's consideration of the circumstances of this case and the arguments of the intervenors, the court concludes that the motion to intervene is untimely and in the exercise of the court's discretion should be denied. See *Black v. Central Motor Lines,* 500 F.2d 407 (4th Cir. 1974); *Harper v. Kloster,* 486 F.2d 1134 (4th Cir. 1973). The intervenors' motion for a new trial must therefore also be denied.

Accordingly, for the reasons stated the motions to intervene and for a new trial are denied, and it is so ORDERED.

The clerk is directed to send a certified copy of this opinion and order to counsel of record.

ENTER:

s/Chief District Judge Turk
Chief, U. S. District Judge

August 10th, 1976

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

JAMES N. FLEMING, et al.
Plaintiffs

vs

Case No. 75-11

ORDER

ALBEMARLE COUNTY, VIRGINIA
AND THE BOARD OF SUPERVISORS
OF ALBEMARLE COUNTY,
Defendants

At Charlottesville in said district this 26th day of April, 1976.

This day came James N. Fleming and Flemenco Enterprises, Inc., Plaintiffs in the above captioned action, by counsel, and Albemarle County, Virginia, and the Board of Supervisors of Albemarle County, Defendants in the above captioned action, by Counsel, and represented to the Court that the parties agree that, based upon and by reason of discussions between the Plaintiffs, the Defendants, and the Court, including a pretrial conference held on September 19, 1975, and further negotiations and concessions by both parties, this cause should be dismissed upon the following grounds:

1. That the Plaintiffs' request for rezoning of 128.06 acres on the west side of Hydraulic Road and Rio Road in the County of Albemarle, and the Plaintiffs' proposed planned unit development "Evergreen" be approved by the Albemarle County Board of Supervisors on the basis of a density of 2.5 dwelling units per acre.

2. That the Plaintiffs' development known as "Evergreen" shall be subject to the existing laws and ordinances currently in effect in Albemarle County, Virginia. It appears from the endorsement of this Order by Counsel for both the Plaintiffs and the Defendants that all parties concerned are in agreement and that this cause should be dismissed. Accordingly, it is

ORDERED

That this Complaint, Civil Action No. 75-11, be, and it hereby is, dismissed with prejudice, and it is

FURTHER ORDERED

That the Plaintiffs' request to the County of Albemarle for rezoning of 128.06 acres on the west side of Hydraulic Road and Rio Road in the County of Albemarle and the Plaintiffs: proposed planned unit development "Evergreen" be, and it hereby is, approved on the basis of a density of 2.5 dwelling units per acre, and it is

FURTHER ORDERED

That the Plaintiffs: development known as "Evergreen" shall be subject to the existing laws and ordinances currently in effect in Albemarle County, Virginia, and to the conditions recommended by the Albemarle County Planning Commission as set out in the minutes of that Commission under date of January 12, 1976, subject to modification by the Board of Supervisors as it shall deem appropriate.

In the event the Plaintiffs and the Board of Supervisors are unable to agree as to the conditions to be imposed with respect to the development of the property, either side may request the Court to reinstate this case on the docket for the purpose of adjudicating the question without payment of costs.

Copies of this order are directed to be mailed or delivered to Gerald G. Poindexter, Esquire, 304 West Cary Street, Richmond, Virginia 23220, counsel for the Plaintiffs, and to George R. St. John, 416 Park Street, Charlottesville, Virginia 22901, counsel for the County of Albemarle and the Albemarle County Board of Supervisors, and to Edward D. Hess, Esquire, 414 Citizens Commonwealth Center, P. O. Box 98, Charlottesville, Virginia 22902, and Ross W. Krumm, Esquire, 700 East High Street, Charlottesville, Virginia 22901, counsel for Lloyd F. Wood, Stuard F. Carwile, Gordon L. Whttler, and William C. Thacker, Jr.

ENTER: **s/Chief District Judge Turk**

DATE: **April 26, 1978**

Endorsed by Counsels of Record
Gerald G. Poindexter
Plaintiff

George R. St. John
Defendants

EXCERPTS FROM TRANSCRIPT OF
JULY 6, 1976
HEARING ON
APPLICATIONS TO INTERVENE
IN THE
UNITED STATES DISTRICT COURT
FOR
THE WESTERN DISTRICT OF VIRGINIA
BEFORE
THE HONORABLE JAMES TURK
CHIEF JUDGE

Page numbers indicated are taken from the complete transcript which is a part of the record.

ALEXANDER P. JANSSEN,

a witness called by the Defendants, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MURRAY:

Q. Mr. Janssen, would you please identify yourself and give your occupation, sir?

A. I am Alexander Patton Janssen, and I am a businessman, a manufacturer.

Q. Mr. Janssen, do you have a position with either of the two parties seeking to intervene?

A. Yes, I am President of the Albemarle County Taxpayers.

Q. How many members does your organization have?

A. We have presently 837.

Q. Has your group been active in the efforts in the County to protect the South Fork Rivanna Reservoir?

A. Yes, sir.

Q. Has it been active in that effort since its inception?

A. Within a few months after its inception.

Q. When was the group formed?

A. Early spring of 1975, March the 1st, I believe is the date.

Q. Has your group opposed other developments other that the Evergreen Development around this reservoir?

A. We have tried to get the County Board of Supervisors to enact conservation zoning around this reservoir and all reservoirs and from that point of view we opposed the

previously mentioned Wendell Wood development. We have written editorials, letters to the editor, which have been commented on by the editor for the Daily Progress.

Q. Mr. Janssen, is your membership open to and solicited from all citizens in the County?

A. Yes.

Q. Is it open to black persons?

A. Yes.

Q. Dis you recently poll your membership and several other groups regarding the issue of protection of the reservoir?

A. We did in 1975 poll the Albemarle County Taxpayers and the same letter was sent to the Citizens of Albemarle Civic League.

Q. What was the results of that poll?

A. To the best of my memory we had 687 ballots returned of which over 97% were for conservation zoning around the reservoir, 2% were against it and 1% were undecided.

Q. Would conservation zoning around the reservoir have prohibited the density of the development of the proposed Evergreen?

A. Yes.

Q. Ninety-seven per cent of the people responding were opposed -- were for that sort of development?

A. Yes.

MR. MURRAY: No further questions. Please answer Mr. Poindexter's.

CROSS-EXAMINATION

BY MR. POINDEXTER:

Q. Mr. Janssen, is it?

A. Yes.

Q. How do you spell that?

A. J–A–N–S–S–E–N.

Q. Would you say that your organization is as Mr. St. John described it, a group that supports conservative fiscal policy?

A. I would say that the – that is not one of the purposes that the organization was organized for. We were organized to inform our members of those facts and those projects or programs that would come before the County Board of Supervisors that would affect them, that would affect them, their taxes or any of their well-being. We are a group that disseminates information on all projects that we think our members would be interested in or that they bring before us and we would like to get more facts about it and then we will poll the members, give them pro's and con's on a particular subject, state it pro and state it con and let them vote on it.

When they send their polls back to us we tablulate them and then present these facts to the County Board of Supervisors. The whole purpose of this organization is that after once you have elected your representatives, most of the time the people no longer have anything to do with you. What we are trying to do is to bring the people more in play with the daily affairs of the County Government by keeping them well informed of what's going on and then asking them to vote on issues so the legislators would know their feeling. That's the main purpose of our organization.

Q. You say it is open to all persons?

A. Yes.

Q. Do you have any black members at this time?

A. Whitney Smith is on the Steering Committee and Ben Fleming is proposed for the Steering Committee. He's at Whitehall and has done active work for us up in Crozet.

Q. You have only two black members?

A. Oh, no. Joe Barber is a member and – we don't know – we don't identify our members by any race at all. If we went through them I think we would find we have a considerable number of black members.

Q. How many?

A. Percentagewise?

Q. Yes, sir.

A. Well, I think then 2%, 3%. This would be 20 or 25 members. We have that many.

Q. How many people are in the County? Do you recall?

A. In the County of Albemarle?

Q. Yes, sir.

A. I think upward of 40,000–46,000.

Q. So you just, in fact, at this time represent a small, a very small, segment of the County?

A. We represent 837-some people.

Q. What percentage is that of over 40,000?

A. I guess 2½%.

Q. Did it take an official act to obtain Counsel to intervene, to attempt to intervene, in this case? Some board meet?

A. Our Executive Committee did.

Q. What interest is it that you believe should be protected that has not already been protected?

A. The preservation of the water supply, the South Fork Rivanna Reservoir. It's public knowledge that it is the most important water supply that Albemarle County has and without it we are in bad shape.

Q. And you believe that your County Board of Supervisors and its Attorney and the Court did not give consideration to that issue before the Order was entered on April 26?

A. Before the Order was entered?

Q. Or at the time the Order was entered.

A. They gave a lot of consideration to it and did give consideration to it for a whole year. The knowledge I have is what I read in the newspaper and from what I know about it and the way the Order was entered I do think our Board of Supervisors had a serious conflict of interest.

Q. Who should have represented the County? Who should have taken over the reins of government and made decisions for the County? Your group or the other group?

A. Our group? No–

Q. Some other group?

A. I don't know what the law says if the County Board of Supervisors doesn't "pan out". I don't know who takes over.

Q. Are you all about to take over?

A. No, we are not about to take over. We want to find out what would happen, how to get representation on the matter that would protect the water and defend the water rights around the reservoir.

A. Wendell Wood was there and we fought Wendell Wood and I told Wendell Wood many times that the public water supply is more important. I am a businessman like he is and I told him we differed on this property and I think he should not be allowed to build out there and I think the same thing is true of Mr. Fleming's or anybody else's. I don't know of a –

THE COURT: The basis of his suit is what I am saying. What he alleged was discrimination because of race. Did you know that?

WITNESS: No, I didn't pay any attention to this.

THE COURT: Well, don't you think you ought to have sort of found out the basis of it before you tried to intervene?

WITNESS: The basis of – the reason we intervened, Judge, is because we thought there wasn't any representation on the decision. We didn't think our Board of Supervisors had made the decision in the best interests of the citizens of Albemarle in the protection of their reservoir.

MR. POINDEXTER:

Q. If they made that their decision or continue to make their decisions what courses are open to you? What can you do about it?

A. Well, what we do about it -- the decisions that are made that are bad we try to present the facts to our membership, just the absolute facts. The pro's and con's and let them make their own decision.

Q. Would you go so far as to recall or impeach candidates or remove them from office?

A. If they get that bad – if things came out – if matters came out that sould be brought to the attention of the citizens of Albemarle, if any newspaper articles were written, we would write them the facts as we would see them and these are only the facts and send them out

in a newsletter to our people. This is to insure that the citizens do know what's going on because not everybody reads our newspaper.

Q. Yes, sir, I understand the information gathering but you have done more than that in this case. You have obtained a lawyer and you have come into Court and you are asking to be a legal entity before the Court.

A. That's right.

Q. To take direct action as such. Is that correct?

A. In this case we do because we think the reservoir can be irreparably damaged if this development is permitted or Wendell Wood's either.

Q. Have you decided to intervene in Mr. Wood's case? That has not been decided by the Court. Have you made your plans to intervene in that case?

A. No. In Mr. Wood's case –

Q. As a legal entity?

A. In Mr. Wood's case we will have to wait and see what that study shows and what the Best Study would say could be permissible. No if it looks and it would be in our judgment that we think the reservoir would be damaged, even if the Best Study says it wouldn't, we might intervene in that. I can't tell you that, but I do hold the reservoir to be the most important asset of the county and the community.

Q. Do any of your members – are any of your members, to your knowledge, adjoining property owners?

A. I think there is one member, I can't recall his name, I tell you who it is, it's Bedford Moore who has property up there, is the only one I know.

THE COURT: Were you present during any of the trial of the

pending case?

WITNESS: No, sir.

THE COURT: You weren't aware of the testimony that came in about the pollution of the lake that occurred further upstreatm, I believe in Crozet?

WITNESS: I know of – I am well aware –

THE COURT: At Morton's Frozen Foods?

WITNESS: Yes, I am well aware of those things.

THE COURT: Why didn't you take some action in Court in connection with those cases of pollution?

WITNESS: Well, sir, we thought our Supervisors were well aware of this. We had discussed these things before and we had our Supervisors representing us.

THE COURT: But the testimony was those were sources of pollution of long standing and was damaging the reservoir. Why hadn't you done anything about that?

WITNESS: Because the Supervisors knew this. There is a Best Study now trying to determine the point sources of pollution and pending the outcome of that I think it would be premature to do anything because the Supervisors have done about all they can do. They have a $150,000.00 study going on it to try to tell us what is going on at the reservoir.

THE COURT: Did you know that they were not going to issue any permits for development until this study is completed?

WITNESS: Yes. There's been more turning now against building at the reservoir. I know that.

THE COURT: Any additional questions?

MR. POINDEXTER: No. sir.

THE COURT: Any redirect?

MR. MURRAY: Yes, Your Honor.

THE COURT: Have you polled your members on whether or not they want to intervene in this suit or did just the Board decide?

WITNESS: No, just the Executive Committee. We have not polled the members.

THE COURT: You don.t know how many of them would want to intervene if they were asked?

WITNESS: No, I don't. I think the majority of voices, 97% that answered that last questionnaire. They have all been, Judge, throught the whole thing, terribly concerned with this water supply throught the whole year.

REDIRECT EXAMINATION

BY MR. MURRAY:

Q. Mr. Janssen, let me clarify one thing in your testimony on cross-examination. Isn't it true that you knew racial discrimination was alieged in this case, but as far as you were concerned the important issue was the reservoie?

A. Right. I think this – in fact, I knew that it had come up because I had heard it before when Mr. Fleming's case first went before the Board a couple of years ago. I knew what was there, but we didn't consider this as the important issue.

Q. What did you consider the important issue?

A. The preservation, or the potential damage that might be done to that reservoir by high density developments.

Q. But you knew that his claim about racial discrimination did exist?

A. Yes, I did, but this is not the primary thing in my mind.

MR. MURRAY: No further questions.

THE COURT: All right. Any additional questions?

MR. POINDEXTER: No, sir.

(Witness steps down.)

MR. MURRAY: Mr. Kenneth Haviland, please. The last witness, Your Honor.

JOHN KENNETH HAVILAND,

a witness called by the Defendants, after being first duly sworn, testified as follows:

DIRECT EXAMINATION:

BY MR. MURRAY:

Q. Dr. Haviland, would you give your name and occupation, please?

A. John Kenneth Haviland. I am a Professor at the University of Virginia.

Q. What are you a Professor of, Dr. Haviland?

A. Aero Space Engineering.

Q. Do you have a position with either of the proposed interveners in this case?

A. Yes, I am President of the Citizens for Albemarle.

Q. How many members are there in your group?

A. About 270.

THE COURT: Now is this the non-profit corporation or is that

the Albemarle Taxpayers?

MR. MURRAY: As of the filing of the Petition to Intervene it was a Virginia Association unincorporated. It is now incorporated.

MR. MURRAY:

Q. Dr. Haviland, has your group been active in lobbying to protect the reservoir?

A. Yes.

Q. For how long?

A. I think about 1972 when the proposal for a revision of the master plan was started. I was retained as consultant.

Q. What was your position at that time?

A. The overwhelming position was taken that we should have protective zoning at the reservoir.

Q. Was this the position of your entire membership as elicited from any poll or study?

A. At that time I didn't even belong.

Q. Is that your membership's position today?

A. It is today.

Q. Have you opposed other developments around the reservoir other than the Plaintiff's in this case?

A. Yes. I opposed Wendell Wood's and an animal hospital. Three of them.

Q. Is membership in your organization open to and solicited from all citizens of the County?

A. It's open to citizens, yes.

Q. Is it open to blacks, specifically?

A. Yes.

MR. MURRAY: No further questions. Please answer Mr. Poindexter's.

CROSS-EXAMINATION

BY MR. POINDEXTER:

Q. Dr. Haviland, did your Board meet and take a — vote a resolution to become involved in this attempt to become involved in this suit?

A I polled the Board.

Q. You polled the Board?

A. Yes, something like 13 people.

Q. Is Mr. Moore on your Board?

A. Mrs. Moore is.

Q. Did you consult her?

A. Yes.

Q. Are you friends of the Moores?

A. I know them, I'm not a close friend. I know them, he's a colleague of mine.

Q. Would you say you opposed other developments around the reservoir?

A. Yes.

Q. What have you done in opposition to these developments?

A. For example, we appeared at most of the hearings in

Wendell Wood's case. I think I called 15 or 20 people to make them aware that this was coming up and I attended the hearing of the Planning Commission and I made a short statement at one of them.

Q. Who suggested that you intervene in this case?

A. I don't remember exactly how it came about, but I was aware that Mr. Janssen was considering it and I talked with him and then I started to poll my membership and sometime Mr. Moore –

Q. Mr. Moore or Mrs. Moore?

A. Mr. Moore. I had called her because –

Q. He's not a member, is he?

A. I believe I am right, she is and he is not. I couldn't say.

Q. Who is paying for it?

A. We established a fund.

Q. What "we" is that?

A. That is, The Citizens for Albemarle established a fund.

Q. Just individual members? How many members did you collect money from?

A. I don't have those records. Our Treasurer would. We sent out a letter to our membership and to two other Civic Leagues.

Q. Civic Leagues, who is that? Are they going to intervene?

A. No.

Q. How do they relate to your organization?

A. No particular way.

Q. Have you decided to intervene in Mr. Wood's case?

A. No, to answer your question truthfully, we actually hired a counsel about two years ago to find out whether we citizens had any standing in Court at all and at that time the citizens did not have any right. We were considering trying to take some action against the County for failure to protect the reservoir.

Later on we consulted with the environmental group at the University to see whether or not we had any standing in Court and we got the same advice that the citizens had no standing in Court.

Q. Citizens had no right?

A. We were told that the citizens had no standing in Court. There was no way we could, legally could, enter the case and try to force the Supervisors to protect these waters around about the reservoir.

Q. Is it fair to say that there is a disenchantment with the Board within your membership?

A. We feel that the present Board of Supervisors is a very excellent Board.

Q. Why are you disagreeing with the decision that they made?

A. I think it was a bad decision.

Q. That is just one isolated incident?

A. I don't say that I am 100% behind them, but I think we have a good Board.

Q. So up to this point their track record is good and represented the will of the body politic here in the County?

A. There is one issue we have, we feel they should have acted to protect the water shed area around the reservoir and they didn't.

Q. Do you have any relationship with Mr. St. John, the Attorney for the County?

A. I am aware that he is a member, but he's never been active in any of the Board meetings or anything like that.

Q. Did you talk to him in preparation for today's testimony?

A. No, the first time I talked to him was when we were waiting for this case to come up.

Q. Did you talk about the case?

A. About this case?

Q. Yes, sir.

A. I'm not sure that we did.

Q. You don't remember whether you talked about this case or not?

A. I think we made just a brief mention of it.

Q. Did he appear to be in sympathy with you?

A. I never got that far.

Q. Do you feel that you are prejudiced in any way against black people?

A. No, sir, I don't.

Q. You say there are black people in this group?

A. I was told that there are. At our meetings I have seen them because I remember showing them where they belong. When we have a meeting it is open to the public.

Q. Do you pay any kind of dues, issue cards?

A. We don't actually issue cards. We pay dues of $1.00.

Q. Other than the Moores, do you know of any other members of your organization that have property adjoining the Evergreen project?

A. Dave Craig is a member.

Q. He was a Plaintiff in this case, wasn't he?

A. Yes.

Q. Is he a member now?

A. I assume so.

Q. The annual dues $1.00?

A. That's the minimum. We solicit you can join for a dollar.

Q. What is it, if you got your day in Court, what is it that you would like to tell the jury or Judge Turk that might affect the outcome of this case?

A. We feel there should be proper planning and we would like to see it rectified. We think the County should plan properly and we felt this power was taken away from us.

Q. Were you aware that the comprehensive plan of permits are in fact 2.5 units per acre in the area you were talking about?

A. I think the present comprehensive plan is very confusingly written and one place it says they are going to protect it and the other says it doesn't. We are working towards the new revision plan. We are putting our emphasis on that plan, and we hope that will straighten it out.

Q. Don't you have a political problem in Albemarle County? That is, the Board won't do what people believe that it should have done? Conservation zoning, historical zoning? Isn't that a part of all of this problem?

A. I wouldn't call it political.

Q. You wouldn't call it that.

A. No.

Q. What would you call it?

A. I think there is certainly a division of interest between people, I mean, you know, different feelings about some people feel progress is really good and you should expand as fast as we can, and some of us feel we should have proper planning or at least restrained planning.

Q. So it is virtually impossible for the Board to please all the people?

A. That's right.

Q. They can't be all things to everybody.

A. Right.

MR. POINDEXTER: All right, Mr. Haviland. Thank you.

MR. MURRAY: No questions, Your Honor.

THE COURT: All right.

(Witness steps down.)